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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term 1978

No. [redacted]

THE PEOPLE OF THE STATE OF NEW YORK,

Petitioner,

v.

JONATHAN WHARTON,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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Preliminary Statement

The District Attorney of Nassau County, on behalf of the People of the State of New York, seeks certiorari to review an order of the Court of Appeals of the State of New York, entered February 22, 1979. That order affirmed, by a vote of four to two, an order of the Appellate Division of the Supreme Court of the State of New York, Second Department, entered December 27, 1977. The order of the

Appellate Division affirmed, by a vote of three to two, an order of the County Court, Nassau County, entered December 8, 1976, which suppressed evidence.

Opinions Below

At the conclusion of a hearing conducted pursuant to a motion by defendant, the County Court of Nassau County suppressed physical evidence seized from defendant and a statement made by him. There was no formal, reported opinion (Appendix A). The opinion of the Appellate Division, which affirmed the order of the County Court, is reported at 60 A.D.2d 291 (2d Dept. 1977) (Appendix B). The opinion of the New York Court of Appeals is reported at 46 N.Y.2d 924 (1979) (Appendix C).

Jurisdiction

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(3). The decision of the New York Court of Appeals is dated February 22, 1979.

Constitutional Provisions Involved

1. The Fourth Amendment to the United States Constitution, which provides:

> The right of the People to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

2. The Due Process Clause of the Fourteenth Amendment to the United States Constitution, which provides:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Questions Presented

1. Whether the federal Constitution requires a holding that, as a matter of law, there is not probable cause to arrest a person whose behavior is inconsistent with any reasonable or plausible explanation except that he was involved in criminal activity?

2. Whether the standard of probable cause adopted by the New York State Court of Appeals defeats the underlying purposes of the exclusionary rule?

STATEMENT OF THE CASE

The Facts

On December 10, 1975, Jonathan Wharton was arrested in Nassau County for possession of stolen property. On January 26, 1976, he was indicted for burglary in the third degree, grand larceny in the third degree, and criminal possession of stolen property in the second degree (Indictment No. 44064).

On December 10, 1976, a pre-trial suppression hearing was conducted in the County Court, Nassau County. Plain-

clothes Officer Gregory Satchwell testified that he and John Talt, both members of the Nassau County Police Department, were on radio motor patrol on the night of December 10, 1975. They were driving on Parkway Drive in Elmont, New York, at about 11 p.m., when they noticed a blue plastic bag on a grass mall near the Cross Island Parkway, about ten feet from the intersection of Parkway Drive and Dutch Broadway.* Upon examination, the officers found that the bag contained a circular saw, power drills, power sanders, and other household power tools. The bag was torn along the bottom.

This area of Parkway Drive was "a very heavy burglary area." On the east side of Parkway Drive, there were homes; on the west side was the mall of the Cross Island Parkway. Frequently, people parked on Cross Island, burglarized the houses nearby, and returned to their cars. The officers concluded that the tools they had found were the proceeds of one such burglary and that, as the burglar was fleeing, the bag had torn. The officers thus returned to their car and waited to see whether anyone would return for the bag and tools. They also notified their supervisor, Sergeant William Buckley (who also testified), that they had found "what [they] believed to be burglary proceeds" and they "requested assistance for a stake-out."

At about 11:45 p.m., Sergeant Buckley arrived at the intersection of Parkway Drive and Dutch Broadway. He

* Parkway Drive and the Cross Island Parkway both run north-south. They are adjacent and parallel to each other, Cross Island being to the west of Parkway Drive. Dutch Broadway, an east-west road, intersects Parkway Drive and passes beneath Cross Island Parkway.

joined Officers Satchwell and Talt in their car and was being "fill[ed] in" when they saw a taxicab driving eastbound along Dutch Broadway, coming from New York City. The cab stopped at the intersection and then slowly backed up onto Parkway Drive. The defendant, Jonathan Wharton, was the only passenger in the cab. He got out, "ran to the bag, scooped it up, ran back to the cab, and got back in." By this time, Sergeant Buckley had returned to his own car. As the cab started to drive away, Buckley pulled his car alongside and Officers Satchwell and Talt drove their car up in front of the cab, thereby blocking its exit. The defendant attempted to get out of the cab. Sergeant Buckley jumped out of his car, shouting "Police" and "Freeze." Buckley's shield was displayed and his gun was drawn "in a ready position pointing skyward." The defendant complied with Buckley's order to stop and turn around, after which Buckley frisked him, handcuffed him, and told him that he was being arrested for possession of stolen property.

Officer Satchwell drove Wharton to the Fifth Precinct. On the way, he informed him of his constitutional rights, which Wharton said he understood. At the precinct, the officer searched Wharton and found a wrench in his pocket. The wrench, which had an octagonal head, was the type used to remove the blade of a circular saw; it fit the circular saw found among the tools in the blue plastic bag. In response to the officer's inquiry, Wharton said he had picked up the wrench after it had fallen out of the bag. Officer Satchwell later asked the defendant, "How did you come to know that these tools were here?" Wharton answered that he had met a man outside a bar on Jamaica Avenue

(Queens County) and the man had asked him to drive to Nassau County to pick up a parcel. Wharton did not know the name of either the man or the bar.

Later that evening, it was learned that the power tools found in the bag had been stolen from the premises at 115-05 Parkway Drive, three houses south of the intersection at which the arrest had occurred.

The Decisions of the State Courts

Immediately after the close of the testimony, the hearing court ruled that the defendant had been illegally arrested. It found that, at the time of arrest, the police did not "know" that the power tools in the bag had, "in fact, been stolen." On that conceded fact, the court concluded that the law required a holding that the officers had no reasonable cause to believe that the defendant was committing or had committed a crime and that, accordingly, the arrest was unlawful. Thus, the hearing court granted defendant's motions to suppress both the physical evidence which had been seized and the statement which it found to have been tainted by the arrest (Appendix A).

Upon appeal by the People, the Appellate Division of the Supreme Court of the State of New York affirmed the County Court's order. The majority opinion stated that "the facts articulated by the police officers consisted of nothing more than a number of innocent facts and observations which, while somewhat unusual if taken in the aggregate, hardly constituted reasonable cause to believe that the defendant had commtited a crime." *People* v. *Wharton,* 60 A.D.2d 291, 295 (2d Dept. 1977) (Appendix B).

Upon further appeal by the People, a majority of the New York State Court of Appeals affirmed the order of the Appellate Division. The Court of Appeals ruled that "reasonable minds [could] differ as to the inferences" to be drawn from the record and that, under such circumstances, the Court was without power to review an affirmed finding of fact. *People* v. *Wharton,* 46 N.Y.2d 924, 925 (1979) (Appendix C). The dissenting judges stated that, "[w]hile by a wild stretch of the imagination one could conjure up an innocent explanation for the defendant's conduct, the totality of the circumstances here points in the opposite direction and clearly establishes the existence of probable cause." *People* v. *Wharton, supra* at 926 (Appendix C).

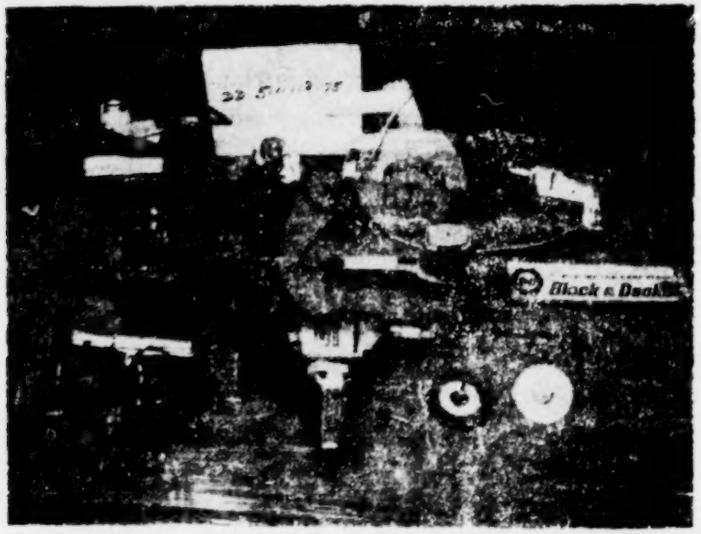
REASONS FOR GRANTING THE WRIT

Ordinarily, the question of whether a simple set of facts is sufficient to establish probable cause would not be an appropriate issue for review by this Court and, ordinarily, the People of the State of New York would not petition for review of such an issue. However, the instant case demonstrates the extent to which the meaning of "probable cause" is being distorted as well as the extent to which the rationale for the exclusionary rule is being undermined. It is important that this Court, which establishes national standards, prevent this redefinition of probable cause, both because of the great number of cases it will affect in New York State and because of the confusing impact it will foreseeably have on police conduct here. Of course, petitioner is well aware that this Court "cannot * * * give plenary consideration to every erroneous holding * * *" *New York* v. *Earl,* 431 U.S. 943, 949 (1977) (Berger, C.J.,

dissenting from a denial of certiorari). However, here, where "the departure from prior law is * * * clear" and "the issue is * * * squarely presented," the case may, perhaps, "be easily resolved in a summary fashion * * *." *Id.* Thus, petitioner submits that the instant case is appropriate for review.

As noted, the facts here were not complex. Two police officers found a seemingly abandoned blue plastic bag. Upon examination, they saw that the bag was torn along the bottom and that it contained several household power tools.* Even aside from the officers' knowledge that this was "a very heavy burglary area," the only reasonable conclusion they could have reached was that these tools were the proceeds of a burglary. Common experience

* A photograph of the tools was introduced into evidence (exh. 1):



would suggest that owners of power tools simply do not abandon them on the side of the road. *Cf. People* v. *Borrero,* 26 N.Y.2d 430, 436 (1970) ("common experience would suggest" that a car owner would not break his car window to gain entry, even if he had locked himself out).

Moreover, the apparent abandonment of valuable property in this particular location was consistent with the familiar *modus operandi* of burglars in the area, *i.e.,* they would park on the highway, burglarize adjoining homes, and return, with the stolen property, to their cars. Thus, the officers' expertise concerning criminal patterns of behavior peculiar to this neighborhood furthered their common sense conclusion that these tools were the proceeds of a crime and that the fleeing burglar had abandoned them when the bag had begun to tear.

The defendant's actions supplied additional cause for the reasonable belief that the tools were stolen and that he was aware of that fact. *Compare People* v. *Brown,* 24 N.Y. 2d 421, 423-24 (1969). It was December and sometime near midnight as Wharton's taxicab drove along Dutch Broadway. The cab stopped at the intersection and backed into Parkway Drive. Wharton then jumped out, ran directly to the bag, "scooped it up," and ran back to the taxi. While it might be conceivable that a person in a private automobile might stop to investigate a bag which was abandoned on the highway, it hardly comports with "common experience" for a passenger in a taxicab, traveling in a residential area near midnight, to instruct the driver to stop, back up onto a side road, and wait, while he satisfies his curiosity about a plastic bag on the street. More impor-

tantly, Wharton did not demonstrate any curiousity about the contents of the bag. He did not look inside the bag to see what it held, as the officers had done, and as one would expect an innocent, inquisitive passerby to do. Instead, he simply ran to the heavy bag and carried it with him as he ran back to his taxi.

Finally, Wharton did not merely grab the bag. Rather, he "scooped it up," thus demonstrating that he was aware that the bag was heavy and suggesting that he knew that the bag was torn along the bottom. The only reasonable explanation of Wharton's conduct is that he had no curiosity about the bag's contents and no need to look inside it because he knew what it contained.

In the face of such overwhelming reasonableness for the officers' belief that the contents of the bag were stolen and that the defendant had knowledge of its contents and was, thus, the thief or receiver, the Appellate Division ruled that there was no "probable cause to arrest." It found that this case merely presented "a number of innocent facts and observations" which were "somewhat unusual if taken in the aggregate" but for which "[t]here might very well have been a logical and innocent explanation." *People* v. *Wharton*, 60 A.D.2d 291, 295 (2d Dept. 1977) (Appendix B). However, neither the Appellate Division nor the Court of Appeals, which affirmed the Appellate Division's order, has suggested what this "innocent explanation" might have been. There appears to be no explanation which is both innocent and reasonable.

For instance, one could speculate that Wharton simply chose to leave his own valuable power tools in a bag on the

side of the road and then to pick them up, via taxicab, in the middle of the night; or, perhaps, someone else had left his own tools there and had asked Wharton to fetch them at midnight; or, then again, Wharton could have been a man who compulsively collected blue plastic bags abandoned near the Cross Island Parkway. These hypotheses are not inconceivable, but they are hardly reasonable. Thus, they could not have vitiated the existence of probable cause. As stated by the dissenting judges in both the Appellate Division and the Court of Appeals, while one may, "by a wild stretch of the imagination," find innocent explanations for the defendant's conduct, "the totality of the circumstances here points in the opposite direction and clearly establishes the existence of probable cause" (Appendices B, C).

This Court has ruled that reasonable cause to believe that a crime has been committed is an issue which turns on probabilities. *Brinegar* v. *United States*, 338 U.S. 160, 175 (1949). It is said to be established by "grounds which would induce an ordinarily prudent and cautious man under the circumstances to believe likewise" [*People* v. *Santiago*, 13 N.Y.2d 326, 331 (1964)] or information sufficient to warrant "a man of reasonable caution" to so believe [*People* v. *Lombardi*, 18 A.D.2d 177, 180 (2d Dept.), *aff'd*, 13 N.Y.2d 1014 (1963)]. The existence of implausible, albeit innocent, explanations should not vitiate the legality of an arrest based on such grounds. Nonetheless, the instant arrest has been ruled unlawful. The meaning of "probable cause" has thus been so distorted as to defy reasonable application by police officers.

A concomitant issue which arises when "probable cause" becomes a vague and nebulous concept is the pro-

priety of applying the exclusionary rule. That rule was purportedly designed "to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it." *Mapp* v. *Ohio* 367 U.S. 643, 656 (1961); *accord, Terry* v. *Ohio,* 392 U.S. 1, 12-13 (1968); *People* v. *Chenault,* 20 N.Y.2d 518, 521 (1967). Thus, when there is no causal link between illegal police conduct and evidence which is subsequently obtained, the deterrent value of the rule ceases to exist. *See Wong Sun* v. *United States,* 371 U.S. 471, 487-88 (1963); Ruffin, *Out on a Limb of the Poisonous Tree: The Tainted Witness,* 15 U.C.L.A. L. Rev. 32, 78 (1967-1968). Similarly, when it becomes impossible for police officers to know or apply coherent standards for legal arrests, there can be no deterrent value to or cogent reason for exclusion. In other words, by its redefinition of probable cause, the Court of Appeals has undermined and defeated the rationale for the exclusionary rule.

Conclusion

The petition for certiorari should be granted.

Respectfully submitted,

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October, 1978 term

APPENDICES

APPENDIX A

COUNTY COURT—NASSAU COUNTY

Present:

Hon. ALPHONSO M. LA PERA, *County Judge*

Indictment #44064

PEOPLE OF THE STATE OF NEW YORK

against

JONATHAN P. WHARTON,

Defendant.

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A Hearing was held immediately prior to trial to suppress the physical evidence seized by the police.

Appendix A

After completion of the Hearing, the Court's Findings of Fact, Conclusions of Law and the Court's Oral Decision was rendered from the Bench and read into the record.

Upon the foregoing, it is

ORDERED, that the defendant's motion is granted.

ENTER

HON. ALPHONSO LA PERA

J.C.C.

GRANTED

Dated: December 8, 1976.

HAROLD W. MCCONNELL

Clerk

APPENDIX B

Majority Opinion of the Appellate Division

THE PEOPLE OF THE STATE OF NEW YORK, Appellant, v. JONATHAN WHARTON, Respondent.

Second Department, December 27, 1977

MOLLEN, J.

We find that the police officers did not have reasonable cause to believe that the defendant had committed a crime when they frisked, handcuffed and arrested him. Consequently, we affirm.

The sole testimony adduced in the course of the hearing was that of the two police officers who arrested the defendant. They testified, in substance, that while driving on Parkway Drive, Elmont, they noticed a blue plastic bag on a grass mall near the Cross Island Parkway. Upon examination, they found that the bag contained power tools. They believed the tools to be the product of a burglary and therefore, over the radio, requested help from their supervisor for a stakeout. They testified that while keeping the bag under surveillance a taxicab drove up to the intersection and then slowly backed up onto Parkway Drive. The defendant left the taxi, "ran to the bag, scooped it up, ran back to the cab and got back in". The officers pulled their cars alongside the taxi and jumped out of their cars, shouting "Police" and "Freeze". The defendant was frisked, handcuffed and told that he was under arrest for possession of stolen property.

The two officers further testified that when they had first observed the bag it was lying on the grass mall about 10 feet from the curb at an intersection; that the area was well illuminated; that the bag was not hidden behind any trees, it was out in the open; that when they first examined the bag they observed that it contained a number of power tools and that the bottom of the bag was ripped; and that it appeared as though the bottom of the bag had started to fall out. The police also testified that they did not know that the tools had been stolen when they arrested the defendant, but that the area was known as a "heavy burglary area."

The requirement that probable cause must be present before a person can be arrested is guaranteed by the Constitution through the Fourth and Fourteenth Amendments. Probable cause is equivalent to "reasonable cause to believe that such person has committed such crime". It is thus set forth as a standard for making an arrest without a warrant in CPL 140.10 (subd 1, par [b]).

In *People* v. *Valentine* (17 NY2d 128, 132), the court stated that the standard of probable cause, as it applies to police, is that which would be probable cause to "a reasonable, cautious and prudent police officer". Although probable cause requires less proof than is required for a conviction, it does mean more than mere suspicion. It is well settled that behavior which is susceptible of innocent as well as culpable interpretation does not constitute probable cause (*People* v. *De Bour*, 40 NY2d 210).

In *People* v. *De Bour* (*supra*, pp. 222-223), Judge WACHTLER, writing for the majority, stated: "In evaluat-

ing the police action we must consider whether or not it was justified in its inception and whether or not it was reasonably related in scope to the circumstances which rendered its initiation permissible (*People* v. *Cantor*, 36 NY2d 106, 111). *We bear in mind that any inquiry into the propriety of police conduct must weigh the interference it entails against the precipitating and attending conditions.* By this approach various intensities of police action are justifiable as the precipitating and attendant factors increase in weight and competence. *The minimal intrusion of approaching to request information is permissible when there is some objective credible reason for that interference not necessarily indicative of criminality * * *. The next degree, the common-law right to inquire, is activated by a founded suspicion that criminal activity is afoot and permits a somewhat greater intrusion in that a policeman is entitled to interfere with a citizen to the extent necessary to gain explanatory information, but short of a forcible seizure* (*People* v. *Cantor*, 36 NY2d, at p. 114, *supra; People* v. *Rosemond*, 26 NY2d 101; *People* v. *Rivera*, 14 NY2d 441, 446, and authorities cited therein). *Where a police officer entertains a reasonable suspicion that a particular person has committed, is committing or is about to commit a felony or misdemeanor, the CPL authorizes a forcible stop and detention of that person* (*CPL 140.50, subd 1;* see *Terry* v. *Ohio*, 392 US 1; *People* v. *Cantor, supra*). A corollary of the statutory right to temporarily detain for questioning is the authority to frisk if the officer reasonably suspects that he is in danger of physical injury by virtue of the detainee being armed (CPL 140.50, subd 3). *Finally*

a police officer may arrest and take into custody a person when he has probable cause to believe that person has committed a crime, or offense in his presence (*CPL 140.10*). *This synopsis represents the gradation of permissible police authority with respect to encounters with citizens in public places and directly correlates the degree of objectively credible belief with the permissible scope of interference.*'' (Emphasis supplied.)

Applying this test to the facts herein, we find that the arresting officer, based upon his own testimony, did not have, at any time prior to his arrest of the defendant, reasonable cause to believe that the defendant had committed a crime. For all he knew the defendant may have been engaged in perfectly lawful activity. It should be further noted that, at the time of arrest, the police officers were unaware that a burglary had been committed. (That fact alone would not require suppression if probable cause to arrest had existed.) The fact that the police officer's hunch regarding the defendant turned out to be correct cannot serve to establish the necessary probable cause (*People* v. *De Bour,* 40 NY2d 210, 216, *supra; People* v. *Scott D.,* 34 NY2d 483, 490).

The testimony of the police officers as to the reasons for arresting the defendant was devoid of articulable facts indicating that they had reasonable cause to believe that he had committed a crime. On the contrary, the facts articulated by the police officers consisted of nothing more than a number of innocent facts and observations which, while somewhat unusual if taken in the aggregate, hardly con-

stituted reasonable cause to believe that the defendant had committed a crime.

There was no immediate urgency for the police officers to have summarily arrested the defendant. There is no indication that there was any volatile situation or danger to themselves. They could have stopped the defendant and the cab driver, detained them, and subjected them both to reasonable inquiry (see CPL 140.50, subd 1). There might very well have been a logical and innocent explanation for the defendant's actions. While it might be argued that the defendant's behavior was equivocal, ''[t]he behavior, at most 'equivocal and suspicious', was not supplemented by any additional behavior raising 'the level of inference from suspicion to probable cause' '' (*People* v. *Brown,* 24 NY2d 421, 423; *People* v. *Corrado,* 22 NY2d 308). If defendant had failed to provide a reasonable or logical response to questioning by the officers, then further appropriate action by the officers would have been justified.

In *People* v. *Messina* (21 AD2d 821), cited in the dissent, the facts were entirely different from those in the instant case and that case has no application here.

To seize, frisk, handcuff and arrest an individual on the basis of the bare circumstances herein, including the absence of knowledge of the police officers as to the commission of any crime, without affording him an opportunity to explain his conduct, is to deprive him of his constitutional right against unreasonable seizure and arrest. To such a result we cannot subscribe.

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SHAPIRO, J. (dissenting). Contending that the County Court was in error when it suppressed both the physical evidence taken from the defendant and an oral statement made by him, the People appeal. Contrary to the view of the majority, I believe that the order appealed from should be reversed and the motion denied.

The only testimony heard by the hearing court was that of the two officers who arrested the defendant and the substance of their testimony is correctly set forth in the majority opinion. I would but add that when the defendant left the taxi and scooped up the bag he did not examine its contents and that when he was searched at the precinct, a wrench was found on his person. He said it had fallen from the bag and that he had picked it up. Later that evening, it was learned that the power tools found in the bag and the wrench found on the defendant's person had been stolen from the premises at 115-05 Parkway Drive, three houses south of the intersection at which the arrest was made.

In suppressing both the power tools and the defendant's statement the hearing court said: "All right. The Court finds that at the time that the Police witnesses [*sic*] the physical evidence in this case, they did not know that those items had, in fact, been stolen. They did not discover that these items were stolen until after the defendant had been arrested. The Court finds that the arrest made of the defendant was unlawful since the Police did not have reasonable and probable cause to believe that he was committing or had committed a crime. The application to suppress the physical evidence is, therefore, granted. Since the arrest was unlawful, the statement made by the defendant is

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tainted by that unlawful arrest, and the Court further suppresses the statement made by the defendant."

In thus deciding the issue before it, the hearing court placed undue emphasis on the fact that the police did not "know" that the power tools had "been stolen" at the time of the arrest. That is not the test, for a police officer is authorized to make an arrest for a crime not only when he "knows" that it has been committed, but also when he has "reasonable cause to believe that such person has committed such crime, whether in his presence or otherwise" (CPL 140.10, subd 1, par [b]).

In *People* v. *Messina* (21 AD2d 821) we hold that a search and seizure was proper when based upon the reasonable belief of the police that the defendant had committed a burglary and that "[t]he mere fact that, at the time of the search and seizure the police did not know about the specific burglary which had actually been committed" was immaterial.

Here the totality of the circumstances surrounding the defendant's conduct clearly gave the police "reasonable cause to believe" that the defendant had committed a crime and had come to collect the fruits of that crime. An owner of valuable power tools does not ordinarily abandon them. When coupled with the circumstance that it was nearly midnight when the taxicab in which the defendant was a passenger pulled up to almost the exact spot where the tools were and that he ran out of the cab and "scooped" up the bag without examining its contents, and with the knowledge of the police that the bag contained valuable power tools, their conclusion that the defendant already knew what was in the bag and that the tools were in fact the fruits of a

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theretofore committed crime was certainly a sensible one based not upon a mere "hunch" but upon probable cause.

While by a wild stretch of the imagination one could conjecture an innocent explanation for the defendant's conduct, the totality of the circumstances here points in the opposite direction and clearly establishes the existence of probable cause which, rationally interpreted, is merely a determination of probabilities (see *Brinegar* v. *United States*, 338 US 160, 175). As the Court of Appeals said in *People* v. *Santiago* (13 NY2d 326, 331), "reasonable cause to believe" that a crime has been committed requires only "grounds which would induce an ordinarily prudent and cautious man under the circumstances to believe likewise" or, as we said, the possession of information which would warrant "a man of reasonable caution" to believe that the person arrested had committed a crime (*People* v. *Lombardi*, 18 AD2d 177, 180, affd 13 NY2d 1014).

Remembering that the requirement for probable cause to make an arrest requires far less proof than is required for a conviction (*People* v. *Miner*, 42 NY2d 937; *People* v. *White*, 16 NY2d 270, 273; *People* v. *Fields*, 50 AD2d 870), it would be "ludicrous to say" that the facts here "are as consistent with the defendant's innocence as not" (*People* v. *Borrero*, 26 NY2d 430, 436).

Under the circumstances the order of suppression should be reversed and the defendant's motion denied.

HOPKINS, J.P., and O'CONNOR, J., concur with MOLLEN, J.; SHAPIRO, J., dissents and votes to reverse the order and deny the motion, with an opinion, in which DAMIANI, J., concurs.

Order of the County Court, Nassau County, dated December 8, 1976, affirmed.

Appendix C

THE PEOPLE OF THE STATE OF NEW YORK, Appellant, v. JONATHAN WHARTON, Respondent.

Argued January 5, 1979; decided February 22, 1979

MEMORANDUM.

The order of the Appellate Division should be affirmed.

On this appeal, the People urge us to reverse a finding of Nassau County Court, affirmed by the Appellate Division, that the police lacked probable cause to arrest defendant Jonathan Wharton. A probable cause determination, involving mixed questions of law and fact (*People* v. *Oden*, 36 NY2d 382, 384), is beyond the review powers of this court in those instances when conflicting inferences may be drawn from the record (see, e.g., *People* v. *Morales*, 42 NY2d 129, 134-135; *People* v. *Rizzo*, 40 NY2d 425, 430; *People* v. *Oden*, *supra*). Where, as here, reasonable minds may differ as to the inferences and thus as to whether the arrest was justified, we may not interfere with the affirmed findings of that court possessing authority to resolve the issues of fact.

GABRIELLI, J. (dissenting). It is recognized, of course, that a probable cause determination is one involving mixed questions of law and fact and, insofar as the determination is factual in nature, it is beyond the review powers of this court. Where, however, the facts and circumstances are undisputed, there is no problem as to credibility, and only one inference can reasonably be drawn therefrom, then the question of whether there is probable cause is purely one of law (*People* v. *Morales*, 42 NY2d 129, 134-135, cert den 434 US 1018; *People* v. *Rizzo*, 40 NY2d 425, 430; *People* v.

Oden, 36 NY2d 382, 384). In the case before us, the evidence presented on the hearing impels but one legal conclusion—that there was probable cause for the arrest. I must therefore dissent.

Our inquiry begins with a recognition of the standard applicable to these determinations. The evidence required to establish probable cause to arrest is not required to be such as to establish proof beyond a reasonable doubt or warrant a conviction (*People* v. *Miner,* 42 NY2d 937, 938). Instead, if the observations or information are sufficient to move a reasonable person to conclude that a crime is being attempted or committed, probable cause exists (*People* v. *White,* 16 NY2d 270, 273, cert den 386 US 1008; *People* v. *Santiago,* 86 Misc 2d 785, 788).

Here, the arrest occurred in an area known for its high incidence of burglaries (see, e.g., *People* v. *Hunter,* 30 NY2d 774, 776); and the police found a torn plastic bag containing a large number of power tools, lying, apparently abandoned, along the highway. It appears further that burglars regularly parked along this road while breaking into nearby homes and, suspecting that the tools may have been abandoned when the thief's plastic bag broke during his flight, the police parked to observe the tools. Their suspicions were confirmed when shortly before midnight, a taxicab backed onto the highway, stopping beside the tools and the defendant ran directly to the bag, scooping it up without even examining its contents, and then ran back to his taxi. Certainly, in the face of the highly unlikely event that some innocent person carelessly abandoned these valuable tools, the observations of the police and their information concerning the habits of burglars in the area were sufficient factors to move a reasonable person to suspect that a crime was being attempted or committed. (See CPL 140.50.) Based upon this suspicion, the police were entitled to stop the defendant and demand from him an explanation of his conduct. To accomplish this task, the police were justified in stopping the taxicab which had pulled away immediately upon the defendant's re-entry with the plastic bag. When the vehicle came to a halt, the police observed the defendant attempt to exit the vehicle. It was at this point that the officers emerged from their cars with guns drawn and shouted freeze. Under the circumstances, evincing as they did the possibility that the defendant was attempting to flee, the predicate for the police conduct crossed the line from reasonable suspicion to probable cause, justifying the defendant's seizure and arrest. While by a wild stretch of the imagniation one could conjure up an innocent explanation for the defendant's conduct, the totality of the circumstances here points in the opposite direction and clearly establishes the existence of probable cause.

Chief Judge Cooke and Judges Jones, Wachtler and Fuchsberg concur; Judge Gabrielli dissents and votes to reverse in an opinion in which Judge Jasen concurs.

Order affirmed in a memorandum.